IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.N.KRISHNAN

SATURDAY, THE 18TH AUGUST 2007 / 27TH SRAVANA 1929

WP(C).No. 2346 of 2007(D)

AGAINST THE ORDER DATED 15/12/06 IN IA 2515/2006 IN OS.154/2004 of III ADDL.SUB COURT, KOZHIKODE

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PETITIONER:

C.K.USHA, AGED 50 YEARS,
W/O.LATE C.K.SAHADEVAN RESIDING AT MODIPARA,
SAMBALPUR TOWN, P.S.TOWN, P.S.DISTRICT,
ORISSA.

BY ADV. SRI.P.S.MURALI

RESPONDENTS:

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1. **C.K.MADHAVAN, AGED ABOUT 67 YEARS,**
   S/O C.K.IMICHI, RESIDING AT 28/1622, JANAKIPURAM,
   K.T.THAZHAM, NELLIKODE, KOZHIKODE.

2. **C.K.SIVAPRASAD, AGED ABOUT 28 YEARS,**
   S/O C.K.MADHAVAN, DO. DO.

3. **C.K.SATHYANATHAN, AGED ABOUT 32 YEARS,.....DO.....**

4. **C.K.MADHAVI, AGED ABOUT 55 YEARS,**
   W/O.C.K.MADHAVAN DO.

5. **C.K.SATHI, AGED ABOUT 30 YEARS,**
   D/O.C.K.MADHAVAN, RESIDING AT POTTAMAL PAZHA,
   P.O.PILLASSERI, KUNNAMANGALAM, KOZHIKODE TALUK.

6. **NISHAD, AGED ABOUT 30 YEARS,**
   S/O.MUHAMMAD, NATTAMMAL HOUSE,
   OLAVANNA AMSOM IRINGALLUR DESOM, KOZHIKODE TALUK.

BY ADV. SRI.K.M.FIROZ for R1
SMT.M.SHAJNA

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 18/08/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

WPC.NO.2346/2007 D

APPENDIX

PETITIONER'S EXHIBITS:

EXT.P1: **COPY OF PLAINT IN O.S.154/2004 ON THE FILE OF SUB COURT, KOZHIKODE – III.**

EXT.P2: **COPY OF I.A.2515 OF 2006 IN O.S.154 OF 2004 ON THE FILE OF SUB COURT, KOZHIKODE – III.**

EXT.P3: **COPY OF THE ADVOCATE COMMISSIONERS REPORT DTD. 04/02/2006.**

EXT.P4: **COPY OF THE ORDER PASSED IN I.A.NO.2515 OF 2006 DTD. 15/12/2006.**

/TRUE COPY/

P.S.TO JUDGE

KSS

M.N.KRISHNAN, J

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W.P.(C) No.2346 OF 2007

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Dated this the 18th day of August 2007

JUDGMENT

This writ petition is preferred against the finding rendered by the III Addl.Sub Court, Kozhikode in I.A.No.2515/2006 in O.S.No.154/2004 on the question of court fee. The petition which arose for consideration before the court below was one for appointment of a receiver. The court declined that prayer in the last paragraph of the order dealt with the question in a half-hearted way and directed the plaintiffs to take steps for amendment of the plaint. I am informed by the counsel for the petitioner that there is a specific issue regarding court fee. Plaintiffs claim partition of the property on the allegation that they are in joint possession of the property with the defendants and have valued the suit for the purpose of court fee and jurisdiction under Section 37(2) of the Court Fees Act.

2. On the other hand, defendants contended that by virtue of a Will executed, they are in exclusive possession of the property and therefore payment of court fee under Section 37(2) is not sufficient and it may have to be valued under Section 37(1) of the Court Fees Act. The question

whether the property is in joint possession or in separate possession is a matter which requires consideration before directing the party to pay court fee or to file an amendment application under Section 37(1) or 37(2) of the said Act. I am afraid that the court below has not directed itself into such an enquiry but in an application for appointment of a Receiver finding some statements of the Commissioner directed the plaintiffs to take steps for amendment of the plaint. It is not in accordance with law. When a specific issue is raised and the said question requires even evidence to find out separate possession or joint possession, the court should conduct an enquiry in that direction enter into a finding and thereafter direct the party to comply with its order. It is also to be considered whether the pleading in the plaint alone be taken into consideration for the purpose of finding out the question of court fee.

Therefore I set aside the finding with respect to the court fee question and direct the court below to conduct an enquiry on that behalf and enter into a finding bearing in mind the various decisions and the principles laid down by this court in these type of cases.

Writ petition is disposed of as above.

M.N.KRISHNAN, JUDGE

Cdp/-